Supreme Court, U.S.
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No. 02-249

In The

Supreme Court of the United States

PEABODY COAL COMPANY,

Petitioner,

v.

WILMA GROVES and DIRECTOR OF OFFICE WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY MEMORANDUM

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INTRODUCTION

Advocates of the treating doctor rule, including the Department of Labor and the Sixth Circuit, argue in support of it by denying that it is a *per se* rule or burden shifting presumption. They deny that it operates irrationally to control the outcome of claims adjudications by nullifying the evidentiary record, and they deny that the rule exaggerates the significance of treating doctors' opinions. If these denials are accurate, no treating doctor rule would be needed or even useful. The truth is that the denials of this rule's bad character are not accurate. It is absolutely clear from reading the ALJs' decisions that have been petitioned to this Court in this case, and in two other pending cases, *Peabody Coal Co. v. Gray*, 35 Fed. Appx. 138 (6th Cir. 2002) (unpublished), *petition for cert. filed,* 71 U.S.L.W. 3319) (U.S. Oct. 17, 2002) (No. 02-585) and *Jericol Mining Co. v. Napier*, 301 F.3d 703 (6th Cir. 2002), *petition for cert. filed,* 71 U.S.L.W. 3401 (U.S. Nov. 27, 2002) (No. 02-834), that an unadorned *per se* preference for the treating doctor principally controlled the outcome of the case, even if the ALJ mentioned other reasons for preferring one body of evidence over another. DOL agreed before the Sixth Circuit in *Groves* and asked that the award of benefits be vacated.

The responses in opposition filed by the Department of Labor and Groves are not accurate descriptions of the proceedings below in *Groves* or the other cases and they are not well grounded in applicable law. The one defense of the rule that no one makes is that it is well founded in science, common experience or any other valid foundation. DOL claims it is proper to assume that a treating doctor gains superior knowledge that no other doctor may acquire,

even after having failed in the agency's rulemaking to produce one science authority to support that theory.

REPLY ARGUMENT

1. DOL argues that this case is an inappropriate vehicle for considering the validity of the Sixth Circuit's rule because the ALJ ultimately relied on the doctor's treatment notes, not on his status or a preference. This is incorrect. In the Sixth Circuit, DOL agreed with Peabody that the ALJ applied an illegal treating doctor preference based on status. Brief for the Federal Respondent at 33 (No. 00-3867) (6th Cir.) (" . . . the ALJ erred in failing to further analyze the credibility of Dr. Blue's and Dr. Johnson's conclusion before according their opinions dispositive weight on both the pneumoconiosis and death due to pneumoconiosis issues. Aside from stating generally that a physician who is familiar with a miner's condition over a long period of time *may* be in a better position to assess the minor's condition, the ALJ did not adequately explain why in this case Dr. Blue's or Dr. Johnson's treatment of the miner *in fact* gave them a better perspective . . . ") (emphasis in original).

If DOL now has changed its mind on the virtues of the ALJ's analysis because of the presence of the treatment notes, it bears further mention that those notes and records do not document treatment for black lung disease or even mention the condition except to the extent that the treating doctors include in their notes a commitment to help Groves with his black lung claim. Neither does the ALJ point to anything in the notes that he found especially persuasive. The notes should have been considered incompetent evidence

in Mrs. Groves' claim after having been deemed unpersuasive in Mr. Groves' claim. DOL is correct in its Sixth Circuit brief that the treating doctor's status constituted the principal or sole reason why the reports were given controlling weight. That is the point of Judge Kennedy's dissent and she also is correct. The Sixth Circuit applied a *per se* preference here and this case is a proper vehicle for testing the validity of that rule.

2. DOL's theory, in which Groves joins, that there is no disagreement among the courts of appeals simply misses the point. An absolute treating doctor rule requires the ALJ to accord controlling weight notwithstanding the record. That rule would be unthinkable. There is no possible justification for it and surely all the circuits agree on that point or at least say they do.[1]

The point on which they do not agree is whether the status of the treating doctor is a factor that is accorded extra weight, whether or not there is any medical reason in the record to upgrade the weight of a treating doctor's

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[1] A strong case can be made that the Sixth Circuit's rule is an automatic preference. In *Groves, Wolf Creek Collieries v. Director, OWCP*, 298 F.3d 511 (6th Cir. 2002) ("*Stephens*") and *Napier*, 301 F.3d 703, the ALJs hardly mentioned any other reason but a treating doctor preference for resolving conflicts in the medical evidence. Window dressing is supplied by the court of appeals to make it seem like there was more to it. *See* App. 64-65 (finding pneumoconiosis based on a treating doctor preference), App. 27 (noting the Benefits Review Board's affirmance of the finding), and App. 36 (according greater weight to the treating doctors on the remaining medical issues because they prepared treatment notes). It would have been equally compelling if the ALJ relied on the opinions of doctors with blue eyes. Groves cites several other black lung cases mentioning a treating doctor rule. They are not discussed because the treating doctor rule was not an issue.

opinion. The rulemaking proved beyond a doubt that status, as a matter of science, is a meaningless factor. Status supplies no medical reason why the treating doctor in a black lung case may acquire any true superior insight into a miner's condition that cannot be articulated in testimony or reports and then reviewed for scientific integrity by other physicians.

The Sixth Circuit and DOL's regulations[2] demand some kind of weight for status alone as if it was a magical factor that defies rational analysis, and on this point, the Fourth and Seventh Circuits plainly do not follow the Sixth Circuit. *See Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438 (4th Cir. 1997). The Sixth Circuit accords great weight to status and has said so without ambiguity. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042 (6th Cir. 1993) ("opinions of treating physicians are entitled to greater weight than those of non-treating physicians . . . "); *Gray*, slip op. at 5-6 ("Our precedents establish that the medical opinions of treating physicians must be accorded additional weight where the ALJ finds them to be well reasoned and credible on the merits").

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[2] *See* 20 C.F.R. § 718.104(d)(5) ("the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight . . . "). The rule goes on to require consideration of the treating doctor's reasoning and documentation and the record as a whole, but that does not undermine the requirement of according evidentiary force to status. At some point, the theory of the regulation is circular when the doctor's status becomes a surrogate for reasoning and documentation in the record as a whole. The decision in *Napier* reflects this phenomenon.

The precise point, therefore, on which the courts of appeals disagree is whether a treating doctor's opinion is *per se* better or stronger than the opinions of non-treating physicians because of the status of the treating doctor. That is not a small matter and this recognition of status as an evidentiary enhancement usually makes all the difference in the outcome of cases in which the rule is invoked.

Like the "true doubt" rule, or any *per se* evidentiary preference, the Sixth Circuit's treating doctor rule is a cheater's rule that serves mainly to change the outcome in adjudications without a valid rationale for the consequences it brings to bear. The Fourth and Seventh Circuits would not have affirmed the ALJ's findings in *Groves*, *Stephens* and *Napier* or reversed the ALJ in *Tussey* and *Gray*, if these cases came before them.

3. DOL correctly observes that no court has invalidated the agency's new treating doctor regulation and that it has been upheld against a facial attack in *National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002). DOL observes also that in *Napier*, the Sixth Circuit applied DOL's regulation to reject the ALJ's reliance on a treating doctor preference when the reliance was not justified by the record.[3] For these reasons, DOL urges this

[3] The Sixth Circuit's analysis in *Napier* proves the invalidity of the rule. As the court of appeals implicitly recognizes, no judge is competent to conclude that some frequency of visits to a doctor or that some number of physical examinations translates into precise knowledge bearing on medical diagnoses and causation that cannot be replicated by a non-examining physician who reads the medical records and tests, especially one who is better qualified in the relevant area of medicine.

Court not to review its rule. This argument also misses the point.

In *Napier*, the ALJ relied mostly on the treating doctor rule and the court of appeals found it inappropriate to have done so, but the court affirmed the ALJ's findings nevertheless as supported by substantial evidence. In *Napier*, the treating doctor rule, whether it is defined according to the DOL regulation or it is simply the embodiment of the regulation, assumes an insidious presence that defies logic and substantial evidence review. *Napier* is simply a different and interestingly flexible, but no less powerful iteration of the Sixth Circuit's original holding that the ALJ "must" give more weight to the treating doctor for no particular reason the court is willing to articulate.

The Sixth Circuit's rule and DOL's rule are approximately the same rule following *Napier*. Neither approach is compatible with the Fourth and Seventh Circuit's views that medical opinions may be credited on medical questions for medical reasons only. The treating doctor rule carries no medical rationale to meet this standard. Neither the DOL rule nor *NMA* nor *Napier* resolves the jurisprudential conflict over the underlying and principal question involved, which is whether treating doctor status merits evidentiary weight. If the Sixth Circuit's rule cannot stand, neither is DOL's regulation valid as applied in the settings presenting in this case, *Gray*, *Napier* or any case in which status is accorded evidentiary weight. The DOL rule adds nothing to an ordinary evaluation of evidence except an authorization to add weight for status.

4. The review of the validity of the treating doctor rule in light of DOL's and the Sixth Circuit's reasoning is

an elaborate game of cat and mouse. Because the rule cannot be defended by statutory authorization and is scientifically unsupported, the advocates of the rule resort to deceptive reasoning and circular logic to divert attention away from the shortcomings and illegality of the rule. The point seems to be to avoid any searching review of the rule because it cannot tolerate a hard look.

The rule is causing great economic damage now in U.S. coal mining regions because insurers will not wait to see how powerful the Sixth Circuit's rule will be. *See* Petition for Writ of Certiorari at 28 nn. 19-21. The end product of the rule reflected in the outcomes and reasoning in this case, *Gray*, *Stephens* and *Napier* suggest significant, if not catastrophic, economic consequences especially for the smaller mine operator. The Court's review is proper to test whether the actions of DOL and the Sixth Circuit in bringing this matter to the brink are legally permissible.[4]

5. DOL again quibbles with the allegation that the rule is a burden shifting presumption or a *per se* preference. It hardly matters what the rule is called because its

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[4] DOL makes little effort to refute the economic consequences of its rule, noting only that the Sixth Circuit's rule will be of "diminishing significance" when the DOL regulation goes into effect. Brief for the Federal Respondent in Opposition at 11. Since the Sixth Circuit purports to adopt and apply the DOL regulation, DOL's assertion is incorrect. Moreover, there are thousands of pending claims and in the time since DOL's regulation became effective over 14,500 new claims have been filed. In Fiscal Year 2002, 8,060 new claims were filed of which at least 2,811 are in Kentucky. Unpublished DOL Document, *Total Black Lung Filings Received by DOL, Fiscal Year 2002*. In any of these cases arising in the Sixth Circuit, the treating doctor's opinion may support an award no matter what is in the record judging from the opinions in this case, *Gray* and *Napier*.

purpose is to change the outcome based upon an assumption of superior knowledge not supported by evidence. Rules that force irrational results as a matter of course, like the treating doctor preference, are not legally valid. *See Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002); *Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S. 359 (1998).

6. DOL claims that the APA does not apply and that section 7(c), 5 U.S.C. § 556(d), does not curtail DOL's authority to displace the APA by regulation. DOL argues that it has regulatory power to supercede the APA as it sees fit. Accordingly, if the DOL rule functions like a burden shifting presumption, it is authorized by Congress and does not illegally supercede the APA. All the same arguments were made by DOL and rejected by this Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 270-71 (1994). DOL adds nothing new to this discussion.

7. As for the regulation, DOL argues that in adopting a treating doctor rule, it simply made a policy choice within its discretion which requires no scientific or other justification, *citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983). In the BLBA, Congress did not authorize DOL to impose a medically unsupported medical criterion as a matter of policy. *See* 30 U.S.C. § 902(f) (setting forth DOL's limited authority to adopt medical criteria).

8. Neither is this Court powerless to review the DOL regulation on a waiver theory.[5] The court below adopted

[5] Groves argues that the validity of the regulation was not raised below. That is not correct. In challenging the Sixth Circuit's rule, all of

(Continued on following page)

the DOL regulation as its own and when considering whether to do so, the court was provided with references to the public record of the rulemaking to the extent relevant. There is no technical impediment to a consideration of the rule and if the Sixth Circuit's rule were struck down, it is hard to see how the DOL regulation could survive in any case, since both are approximately the same. Because the rule already is having a significant adverse economic impact on mining and mining communities, this opportunity for early review should be taken.

9. The questions presented here are timely and of great importance to the mining and insurance industries. This Court should consider and resolve the important rights at stake here.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully Submitted,

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the relevant rulemaking record was brought forth and argued to the Sixth Circuit. In this case and more so in *Napier*, the Sixth Circuit applied the DOL regulation in a context in which its validity was fully debated. There is no waiver here.